

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES BONNER,

Defendant-Appellant.

UNPUBLISHED

January 17, 2003

No. 230514

Wayne Circuit Court

LC No. 00-004972

ON REHEARING

Before: Cooper, P.J., and Hood and Kelly, JJ.

PER CURIAM.

This case is before us on remand from the Michigan Supreme Court. In our original opinion, the majority held that the trial court erred when it determined that defendant's waiver of a twelve-member jury was valid despite the fact that defendant was not informed that a failure to stipulate to an eleven-member jury could have resulted in a mistrial. Pursuant to the Michigan Supreme Court's reversal of that determination, we address the remainder of the issues defendant raised on appeal.

Defendant contends that he is entitled to resentencing because the sentencing guidelines were improperly scored. We agree. "A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score." *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). A trial court's scoring decision will be upheld on appeal if there is any supporting evidence in the record. *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996).

Defendant claims that the trial court erroneously scored ten points for OV 4, serious psychological injury requiring professional treatment. MCL 777.34. Ten points may be scored under OV 4 "if the serious psychological injury *may* require professional treatment. MCL 777.34(2). In making this determination, the fact that treatment has not been sought is not conclusive." MCL 777.34(2) (emphasis added). In this case, the trial court noted "the child's living situation, and the length of time, and number of times of the assault" when it concluded that ten points should be scored under OV 4. A review of the record reveals that the victim was seven years of age when she was repeatedly sexually assaulted by defendant, who was her mother's boyfriend. As a result of defendant's actions, the victim was separated from her mother and now lives with her father. Although the record indicates that the victim has yet to seek psychological treatment, the statute does not require proof of such treatment. Accordingly, we

find that the trial court's scoring of OV 4 was supported by the evidence. See *Elliott, supra* at 260.

Defendant also challenges the scoring of offense variable (OV) 11, which provides for a score of fifty points where “[t]wo or more criminal sexual penetrations occurred[.]” MCL 777.41(1)(a). The trial court ruled that this score was warranted because multiple penetrations were involved. While the evidence supports a finding of multiple penetrations, we note that points may not be scored under OV 11 for the penetration that forms the basis of a first-degree criminal sexual conduct offense. MCL 777.41(2)(c). Moreover, MCL 777.41(2)(a) requires that the sentencing court only score those sexual penetrations arising out of the sentencing offense. This Court recently construed the term “arising out of the sentencing offense” to include those sexual penetrations that “result or spring from the sentencing offense.” *People v Mutchie*, 251 Mich App 273, 276; 650 NW2d 733 (2002). Defendant was charged with five separate counts of first-degree criminal sexual conduct. Without evidence that two or more of these acts arose out of each other, scoring fifty points under OV 11 was improper.

We note that a scoring for the multiple sexual penetrations would have been proper under OV 13. MCL 777.43. Defendant did not receive any points under OV 13 at trial. However, at the time this offense was committed defendant would be limited to a score of twenty-five points under OV 13. MCL 777.43.¹ Offense variable 13 applies to a continuing pattern of criminal behavior and does not require that the sexual penetrations arise out of the sentencing offense. Rather, under OV 13 “all crimes within a 5-year period, including the sentencing offense, shall be counted” MCL 777.43(2)(a).

Accordingly, a remand in this case is necessary because OV 11 was scored improperly and the error affected defendant's guidelines range.

We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Jessica R. Cooper
/s/ Harold Hood
/s/ Kirsten Frank Kelly

¹ MCL 777.43 was amended by 1999 PA 279, effective October 1, 2000.